In The

SUPREME COURT OF THE UNITED STATES

October Term, 1948

No. 14

INTERNATIONAL UNION, U. A. W. A., A. F. of L., LOCAL 232, ET AL., PETITIONERS,

V.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

No. 15

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V.

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BRIEF FOR THE STATES AS AMICI CURIAE

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STATEMENT.

This brief is submitted by the several states pursuant to the permission granted by Rule 27 (9) of the rules of this Court.

The questions presented are set forth in appellees' brief as follows:

1. Does an order of a state board violate constitutional provisions relating to involuntary servitude, freedom of assembly, and freedom of speech, by prohibiting the petitioners from inducing a concerted program of repeated absences from work of a few hours' duration each during regularly scheduled working hours without giving advance notice to the employer and without leave, where such absences are for the announced purpose of attending union meetings but are for the real purpose of interfering with production so as to exert pressure upon the employer to accede to demands made or to be made in the process of collective bargaining?

2. Does such order violate the commerce clause of the Constitution (a) by intruding upon a field prohibited to states by congressional enactment; or (b) by depriving the petitioners of any rights guaranteed to them by congressional enactment?

These questions are of vital importance to every state of the Union and, as Attorneys General of our respective states, we deem it our duty to our states and to this Court to present this brief which will be devoted to argument upholding the rights which the states possess under the Constitution, and to those rights which still obtain under the Labor Management Relations Act, 1947.

ARGUMENT.

I.

Congress Has Under the Constitution, as Interpreted by the Supreme Court of the United States, the Right to Regulate Matters Which Affect Interstate Commerce.

We concede the fact that Congress has the authority under the commerce power of the Constitution to regulate labor relations when such relations have an effect upon interstate commerce. The Supreme Court of Wisconsin pointed out in the case of *Wisconsin Employment Relations Board* v. *Allis-Chalmers Workers' Union*, 249 Wis. 590, 25 N. W. (2d) 425, in reference to the National Labor Relations Act as follows:

> "The power of the National Labor Relations Board to initiate proceedings in labor relations affecting interstate commerce was necessary in view of the source and scope of federal powers to deal with the subject of labor. The National Labor Relations Act is not an exercise of police power. The power of congress to deal with the subject has its source in the commerce clause of the constitution, U. S. Const. Art. 1, Sec. 8, cl. 3, and the purpose of the act was to prevent such unfair labor practices as proximately affect interstate commerce. * * *"

This power applies even though the business may be entirely an intrastate business but its activities affect interstate commerce. This Court pointed out in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 81 L. Ed. 893:

> "* * * Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropri-

ate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. * * *"

II.

The Scope of the Labor Management Relations Act, 1947; Relating to "Unfair Practices" Only Applies When Interstate Commerce is Affected.

Since the Labor Management Relations Act, 1947, was enacted subsequent to the time the litigation at hand originated, the rights of the respective parties must be determined in the light of that act. In determining what rights the state has, we, like the State of Wisconsin, are interested in two jurisdictional problems:

(1) The authority of the Wisconsin Employment Relations Board to regulate, under Wisconsin statutes, the activity of the union in causing frequent work stoppages and slow-down tactics to be effected.

(2) The authority of the Wisconsin Employment Relations Board to regulate, under Wisconsin statutes, the activities of employees in coercing and intimidating other workmen in order to secure union demands.

The applicable portion of Section 10 of the Labor Management Relations Act, 1947, reads as follows:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *"

This does no give the board authority to regulate any and all unfair practices but only those which affect inter-

state commerce. As this Court held in *Schecter Poultry Corporation* v. *U. S.*, 295 U. S. 495, 79 L. Ed. 1570:

> "In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. * * *"

It is clear then that if the practices complained of here "affect" interstate commerce then Congress could well regulate such activities. Congress did choose to regulate certain unfair practices in Section 8 (b) applied to labor organizations. For convenience Section 8 (b) is set forth in "Appendix A" but summarizing, these provisions make it an unfair labor practice to coerce employees or restrain them in their right to self-organization, to bargain collectively and engage in concerted activities for mutual aid or protection, or their right to refrain from such activities.

Section 8 (b) (4) also forbids unfair practices in relation to strikes or concerted refusals to use, manufacture, process, or handle goods when certain illegal objectives are in mind. These illegal objectives include (1) forcing employers or self-employed to join a labor organization or to cease using and handling the products of another producer or manufacturer, (2) forcing any employer to bargain with a labor organization when it has not been certified as representative of the employees under the act, or forcing any employer to bargain if another organization has been certified, (3) forcing any employer to assign work to employees of one labor organization as against another labor organization unless the employer is failing to conform to an order of the Board determining

the bargaining representative for employees performing such work.

Considering our first problem at hand which is the authority of the state board to regulate slow-downs and work stoppages, we note that Section 8 (b) does not cover such activity. Section 8 (b) (4) is the only unfair practice which comes near being similar to the practice at hand. It is clear that the unfair objectives listed in Section 8 (b) (4) were not any of the objectives of the union in the case at hand. As disclosed by the record (R. 46,47) the objective was one in which the union attempted to put economic pressure on the company without striking. Now certainly it will appear that the Federal Labor Board cannot interfere with such activities if the activity is not prohibited, but this does not mean that a state cannot regulate such activity.

> "* * * It has long been recognized that in those fields of commerce where national uniformity is not essential, either the state or federal government may act. * * * Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. * * *"
>
> *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 86 L. Ed. 754.

> "There is no suggestion of conflict with a Federal enactment. The mere power of the Federal Government to regulate interstate commerce does not disable the States from adopting reasonable measures designed to secure the health and comfort of their people. * * *"
>
> *Clason* v. *Indiana*, 306 U. S. 439, 83 L. Ed. 858.

> "* * * This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken. * * *"
>
> *Parker* v. *Brown*, 317 U. S. 341, 87 L. Ed. 315.

The union was not striking as they themselves state that they wanted to avoid such a hardship. The Wisconsin legislature in its wisdom also wanted to avoid hardship on the part of the public and the employer. Wisconsin statute, Sec. 111.01, reads:

> "The public policy of the State as to employment relations and collective bargaining, in the furtherance of which this subchapter is enacted, is declared to be as follows:
>
> "(1) It recognizes that there are three major interests involved, namely: That of the public, the employee, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others."

The Wisconsin Legislature recognized economic pressure by means of a legitimate strike as a fair labor weapon, but the state would not permit each and every harrassing endeavor on the part of the unions. The demands of both employer and employee must be considered in the light of the rights of the public generally.

Even if the Federal Labor Board did have power over such activity it could act only if interstate commerce is affected. And this, of course, leaves the states free to control such activities as part of their police power when interstate commerce is not affected. This court held in

the *Allen-Bradley Local* v. *Wisconsin Employment Relations Board case*, 315 U. S. 740, 86 L. Ed. 1154, that the board's order declaring it an unfair labor practice under Wisconsin statutes for an employer to coerce or intimidate an employee in the enjoyment of his legal rights was valid and not unconstitutional and void as to the provisions of the National Labor Relations Act. In the instant case it is not shown that interstate commerce is affected and, therefore, this case is much the same as *Allen-Bradley* v. *Wisconsin Employment Relations Board*, supra, since this essential fact giving the Federal board jurisdiction is not shown. The Labor Management Relations Act requires by Section 10 (b) that the Federal board can act "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice * * *." Thus we see the Federal board is quite limited in its activity as a charge must first be brought before it can act and certainly Congress did not intend in such a situation to prohibit state action where needed.

> "When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation."
>
> *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 86 L. Ed. 754.

> "Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested * * *."
>
> *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 89 L. Ed. 1915.

The Labor Management Relations Act does not contain words of such specific nature as to supersede the Wisconsin state regulation by Federal regulation.

As to the second problem concerning intimidation and coercion of fellow employees, we see the Labor Management Relations Act in Section 8 (b) (1) and Section 7 does enter the field involved here. However, once again the Federal Labor Board can only enter the field when it is charged and shown that interstate commerce is affected. In this instance the disturbances are so remote that interstate commerce is not affected, but still some control is desirable, and it is submitted that it is well within the police power of the state to control such activity. (Note reference above to *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 86 L. Ed. 1154).

III.

Not Only do the States Have Authority to Regulate the Activities Here Involved as Part of Their Police Power, But the Labor Management Relations Act in Various Sections Indicates that States Authority to Control These Activities is Left Untouched.

Section 10 (a) reads as follows:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: PROVIDED, that the Board is empowered by agreement with any agency of any State or territory to cede to such agency jurisdiction over

> any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsisent with the corresponding provision of this Act or has received a construction inconsistent therewith."

The second sentence of Section 10 (a) indicates that Congress did intend state action. Note that the Federal Board's jurisdiction is not affected by any other means of "adjustment or prevention that has been or *may be* established by agreement, law, or otherwise." The authority of the Federal Board to handle unfair labor practices of course only applies to practices listed in Section 8. In other words, the Federal Board's jurisdiction is supreme as far as unfair practices listed in Section 8 are concerned, but the words "may be established by agreement, law, or otherwise" certainly admits limitations on unfair practices by state labor boards pursuant to state law.

Section 13 reads as follows:

> "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

The important part of this section is the phrase "or to affect the limitations or qualifications on that right." The words have some meaning or they would not be included, and it is clear that it is state qualifications on the right to strike which the act does not interfere with.

This must be true because to read it as applying to Federal limitations would be redundant, inasmuch as "except as specifically provided for herein" already covers all the possible federal limitations. Then what "limitations" are left? The state's limitations, of course. To construe the section any other way does not make either good English or good sense.

Section 14 (b) expressly acknowledges state jurisdiction over union security provisions, so that states have the last word in either permitting or not permitting security agreements.

It will be admitted by all that the Labor Management Relations Act is not as explicit as it might be in defining jurisdiction of the Federal Board. However, this Court should never give any more jurisdiction than is specifically called for because if Congress wished to occupy the field they could do so in specific language, and absence of such language certainly discourages any indication of Federal pre-emption.

IV.

Regulation of the Unfair Practices Here Involved Do Not Interfere With the Purposes and Objectives of the Labor Management Relations Act.

Section 7 guarantees that: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities

except to the extent that such right may be affected by an agreemnt requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3)." The order of the state board does not interfere with employee's rights enumerated above. The right to engage in concerted activities for mutual aid or protection is a qualified right in that only reasonable steps can be taken. This does not sanction a riot, or lynching party. Just as the federal government can control intrastate activities on the fact it may "affect" interstate commerce, so the states can control the right to strike so as to keep it peaceable and within bounds as part of their police power. The state board by its order does not forbid a strike but it does seek to prohibit any and all harassing activities that are illegal under Wisconsin law. Furthermore, the objectives of the federal act only apply when interstate activities are affected, so that the states should not be hampered in their police activity until active federal control of the problem has been taken. It is conceded then that the state's power is limited, but until the federal board has taken jurisdiction and shown that interstate commerce is affected by the unfair practices, the power of the state to regulate these activities is not limited.

> "While the commerce clause has been interpreted as reserving to Congress the power to regulate interstate commerce in matters of national importance, that has never been deemed to exclude the states from regulating matters primarily of local concern with respect to which Congress has not exercised its power, even though the regulation has some effect on interstate commerce. As we had occasion to point out at the last term of Court, there are many matters which are appropriate subjects of regula-

tion in the interest of the safety, health and well-being of local communities which, because of their local character and their number and diversity and because of the practical difficulties involved, may never be adequately dealt with by Congress. Because of their local character also there is wide scope for local regulation without impairing the uniformity of control over the commerce in matters of national concern and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the commerce clause. Such regulations, in the absence of supervening Congressional action, have for the most part been sustained by this Court notwithstanding the commerce clause. * * *"

Duckworth v. *Arkansas,* 314 U. S. 390; 86 L. Ed. 294.

Section 501 (2) defines "strike" as including slowdowns or concerted stoppages of work, but this right is not guaranteed in Section 7 so the presumption is that this is not an unlimited right given to employees. This is made even clearer by Section 13 which we discussed before. This section states that there are no federal limitations "except as provided for herein" to interfere with the right to strike or to effect the limitations on that right. This we pointed out must apply to state limitations or it would be included among the exceptions "specifically provided for herein."

CONCLUSION.

Section 1 of the Act gives the general purposes of the Act. It may be summed up as having the objective of promoting industrial peace under law. To achieve peace in industry we ought to as lawyers be able to first show

coordinated government regulation. When forces of government cannot cooperate under law it is hard to expect the forces of industry to cooperate. This means that the best and most efficient way to regulate labor practices should be jealously sought over jurisdiction and power. Distributed authority among the states to handle minor problems is superior to complete federal domination because local administration can acquaint itself with local problems. If the jurisdiction of the Federal Board is invoked only when interstate commerce is affected and states can handle most problems before they become acute, then the Federal Board can concentrate on the important nationwide problems. This method is in keeping with the intention of the 10th Amendment which had the purpose of keeping power at home and only giving it to Congress and the Federal government as enumerated in the Constitution. Should labor problems assume the place where complete federal domination is desirable then the Constitution should be changed. In the light of the opinions of this Court and the limiting words of our Constitution, we submit that the Wisconsin Employment Relations Board did have the authority and jurisdiction to give the orders it gave in limiting the activities of the union here involved.

Respectfully submitted,

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APPENDIX A

Section 8 (b) reads as follows:

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: PROVIDED, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer,

or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: PROVIDED, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

"(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

"(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."